THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0856, State of New Hampshire v. Jared Brooks, the court on January 4, 2008, issued the following order:

Following a bench trial, the defendant, Jared Brooks, was found guilty of possession of a controlled drug, RSA 318-B:2 (2004), possession of a controlled drug in a motor vehicle, RSA 265:80 (2004), and felon in possession of a deadly weapon, RSA 159:3 (2002). On appeal, the defendant argues the trial court erred in denying his motions to suppress because: (1) the scope of the initial traffic stop was unlawfully expanded; (2) he did not consent to the pat-down frisk of his person; and (3) the subsequent search warrant was insufficient. We affirm.

We first address the defendant's claims under the State Constitution, State v. Ball, 124 N.H. 226, 231 (1983), and cite federal opinions for guidance only. In reviewing the trial court's ruling, we accept its factual findings unless they lack support in the record or are clearly erroneous. State v. McKinnon-Andrews, 151 N.H. 19, 22 (2004).

The defendant first argues that the scope of the initial traffic stop for a speeding violation was impermissibly expanded when a drug-detection canine performed an exterior drug sniff of his vehicle. "Any expansion of the scope of a motor vehicle stop to include investigation of other suspected illegal activity is constitutionally permissible only if the officer has reasonable suspicion that other criminal activity is afoot." State v. Hight, 146 N.H. 746, 748-49 (2001) (brackets and ellipsis omitted). "To determine the sufficiency of an officer's suspicion, we consider the articulable facts in light of all surrounding circumstances, keeping in mind that a trained officer may make inferences and draw conclusions from conduct that may seem unremarkable to the untrained observer." McKinnon-Andrews, 151 N.H. at 26. Here, the officer possessed reasonable and articulable suspicion that other criminal activity was afoot. Upon speaking with the defendant, the officer smelled the odor of burnt marijuana emanating from the vehicle. In addition, the officer observed that the defendant appeared very nervous and exhibited signs of dry-mouth, including white saliva in the corners of his mouth. Given these articulable facts, it was not improper for the officer to expand the scope of the initial traffic stop to include investigation into potential possession of illegal drugs and employ the use of the drug-detection dog.

We are unpersuaded by the defendant's argument that the odor of burnt marijuana, as distinguished from fresh marijuana, does not supply some basis to further investigate the presence of the drug. See, e.g., State v. Livingston, 153 N.H. 399, 405 (2006); State v. Gilson, 116 N.H. 230, 234 (1976). Further, upon review of the record, we conclude the canine sniff was appropriate under State v. Pellicci, 133 N.H. 523, 534-35 (1990).

The defendant also argues that the evidence obtained as a result of the pat-down search of his person should have been suppressed because he did not provide a free, knowing, and voluntary consent. "A voluntary consent free of duress or coercion is a recognized exception to the need for both a warrant and probable cause." Livingston, 153 N.H. at 405. The State bears the burden of proving, by a preponderance of the evidence, that the consent was free, knowing and voluntary. Id. Although the defendant was in fact detained and was not free to leave at the time he provided consent, we agree with the trial court that, under the totality of the circumstances of this case, it was objectively reasonable for the officer to conclude the defendant had consented to the pat-down search. See State v. Szczerbiak, 148 N.H. 352, 358 (2002). The trial court found that, although nervous, the defendant had been cooperative throughout the encounter and had not been formally arrested at the time he consented. Although there were two officers on the scene, the defendant was questioned by only one officer, and the officer's request for the defendant's consent implied a right to decline. Specifically, the officer stated, "would you mind if I pat you down." In addition, the trial court found credible the officer's testimony that the defendant had verbally consented to the search in response to his request. Our review of the record does not demonstrate that the trial judge's finding of consent is unsupported by the record.

Finally, the defendant argues that the warrant obtained for the search of his vehicle was unlawful because it was based upon his unlawful detention and the search of his person. We disagree. "Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." See State v. Cannuli, 143 N.H. 149, 151 (1998). We pay great deference to a magistrate's determination of probable cause. Id. at 152. Based upon our determination above, it was not improper for the magistrate to consider the evidence resulting from the dog-sniff and pat-down in determining probable cause. Review of the affidavit in question demonstrates that the magistrate was presented with sufficient facts and circumstances to establish probable cause. The affidavit noted the officer's initial observations of the defendant, the odor of marijuana emanating from the vehicle, the two "active alerts" in the area of the defendant's trunk by the drug-detection canine, as well as the drugs obtained as a result of the pat-down search of the defendant. In addition, the

affidavit provided adequate information regarding the reliability of the police canine, including his reliability rate, training, and experience.

Because the Federal Constitution offers no greater protection than the State Constitution in these areas, see Livingston, 153 N.H. at 405, 408, we reach the same result under the Federal Constitution as we do under the State Constitution.

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

Eileen Fox,
Clerk